



ACORN Community Legal Education Series California Indian Legal Services

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What is an Indian Custodian?


What's in this guide and how can it help me?

This guide explains what an Indian custodian is. It also explains what responsibilities and rights Indian custodians have.

This guide can help you if you are an Indian custodian or you need to become one.

This guide can also help you if you are an Indian parent and you think you want someone else to be an Indian custodian for your child.

 An Indian Custodian Form (“Designation of Indian Custodian”) is attached for you to use.


 **TIP:** If a word in this guide appears in **bold**, we define it afterwards. These terms are also defined at the end of this guide in the section called “Some Helpful Legal Terms,” starting on Page 8.

☉ What Is an Indian Custodian? ☉

What is an Indian custodian?

An Indian custodian:

- is an Indian person who has custody of an Indian child but who is not that child's biological parent
- has the right and responsibility to make decisions about a child's day-to-day care, well-being, and overall best interests
- has special rights under the Indian Child Welfare Act (ICWA).

 **TIP:** There are several different kinds of custody. See the section, “Some Helpful Legal Terms,” for a more detailed explanation of the different kinds of custody.

What is the Indian Child Welfare Act (ICWA)?

The Indian Child Welfare Act (ICWA) is a federal law that sets out rules that state courts must follow in child custody cases where Indian children are being removed from the homes of their parents or Indian custodians. These rules are designed to keep Indian children connected to their families

and tribes. For more information, see the ACORN Community Legal Education Guide, “What Is the Indian Child Welfare Act?”

Indian Custodian Checklist:

Three conditions have to be met for someone to be considered an Indian custodian:

- ✓ The child is an “Indian child” **and**
- ✓ The custodian got custody of the child in one of three specific ways **and**
- ✓ The custodian is an “Indian person.”

⇒ You will need to read this whole section carefully to find out if you meet each of these three conditions.

Who is considered an Indian child?

The child must be an Indian child as defined in the Indian Child Welfare Act (ICWA). ICWA defines an “Indian child” as an unmarried person under the age of 18 who:

- is a member of a federally-recognized Indian tribe **or**
- is eligible for membership in a federally-recognized Indian tribe **and** is the biological child of a member of a federally-recognized Indian tribe.

☎ If you don’t know if a tribe is federally recognized, you can contact the tribe.

What are the ways Indian custodians are allowed to get custody of an Indian child?

In order to be considered an Indian custodian, you have to get custody of an Indian child in one of three specific ways:

- the child’s parent transfers the temporary physical care, custody, and control of the child to you **or**
- you get custody under tribal law or custom **or**
- you get custody under state law (such as through a “guardianship”).

💡 **TIP:** A **guardian** is someone who has custody of a child or children by order of the court. The court decides what specific rights each guardian has. Guardians may be related to the child or children, but they don’t have to be. They can also be called “legal guardians.”

Who is considered an Indian person?


There are several definitions of “Indian person”:


- If custody was obtained under state law, or from the parent(s), then an Indian person is someone who is defined as an “Indian” under federal law (such as a member of a federally-recognized Indian tribe).
- If custody was obtained under tribal law or custom, then an Indian person is

someone who is considered an “Indian” under that tribe’s laws or customs.

What if I don’t meet all three conditions, as listed above, but I’ve been acting as the child’s parent for a long time?

If you don’t meet all three conditions, you can’t be considered an Indian custodian. You can ask the court to recognize you as the child’s “**de facto parent**” under California law.

 **TIP:** A **de facto parent** is someone who has been taking care of the child’s day-to-day needs (as if they were the child’s parent) for a long time.

 The rights and responsibilities of de facto parents are very complicated. You can contact your local CILS office for more information about de facto parent status.

Rights and Responsibilities of Indian Custodians

What are my responsibilities as an Indian custodian?

- You are responsible for the child’s day-to-day care and well being. For example, you must be sure that the child goes to school and gets the medical care they need.

 If you have problems enrolling the child

in school or getting the child medical care because agencies or officials don’t recognize your right to do this as an Indian custodian, contact your local CILS office to discuss your situation. See Page 6 for more information on how you can prove you have these rights as an Indian custodian.

- You are not responsible for the child’s financial support unless the child’s parents have had their parental rights “**terminated**” (ended). If the child’s parents have not had their parental rights terminated, they are still responsible for supporting the child financially.

Can I get financial assistance for the Indian child?

You may be eligible for a number of state and federal assistance programs. These programs include:

- California Work Opportunity and Responsibility to Kids (CalWORKs). This is the federal welfare-to-work program run by the state of California.
- Foster Care benefits
- Kinship Guardianship Assistance Payment (Kin-GAP) benefits. This is a payment program for relatives who become guardians of the child in their care and leave the foster care program.
- Adoption Assistance Program
- Supplemental Security Income (SSI) (for children with disabilities)

Your eligibility for these programs depends on whether you’re related to the child and

how you got custody of the child.

Can I get medical care benefits for the child?

- If you are eligible to receive CalWORKs, Foster Care, SSI, or Kin-GAP on behalf of the Indian child, the child will be eligible to receive Medi-Cal benefits.

- The child may also be eligible for federal health care benefits offered by Indian Health clinics.

☎ For more information about health care benefits offered by Indian Health clinics, you can contact the California Area Indian Health Service at (909) 930-3945 or go to their website, at www.caoihs.org

- In some cases, the child may also be eligible for private medical insurance benefits through his or her tribe.

☎ You can contact the child's tribe for more information about getting the child private medical benefits.

- If you have private medical insurance, your insurance plan may cover the child's medical care. But insurance companies may want you to have a formal custody arrangement, such as a guardianship.

☎ You can contact your medical insurance company to find out if your plan covers the child in your custody.

- You should know that if you get state or

federal financial assistance for the child, the District Attorney may take the child's parent(s) to court and try to get financial support for the child from them.

What rights do I have as an Indian custodian?

As an Indian custodian, you have the right to:

- enroll the child in school
- get the child the medical care they need
- participate in child custody cases where ICWA applies, and have certain rules followed in those cases

What child custody cases does ICWA apply to?

ICWA applies to child custody cases where an Indian child may be taken away from a parent or Indian custodian, or where parental rights are being “**terminated**” (ended).

These include cases where:

- the child may be placed in foster care
- someone may become guardian of the child by order of the court
- the child may be put up for adoption
- the child may be removed from the home by a child protective service agency.

ICWA **doesn't** apply in custody disputes between the biological mother and the biological father, unless:


- someone who isn't the child's parent(s) may get custody of the child **or**

- one parent is trying to terminate the rights of the other parent.

What specific rights do I have in these child custody cases?

If you're an Indian custodian, ICWA gives you almost the same rights that a parent has in these cases. Your rights include:

- the right to get “**notice**” of (be told about) the child custody “**hearing**”

 **TIP:** A “**hearing**” is a meeting with a judge, and the people, tribe(s), or institution(s) involved in the court case. It usually takes place in a courtroom. When children are involved, the meeting takes place behind closed doors. During the hearing, each side argues for their point of view in the case.

- the right to participate in the child custody hearing
- the right to ask for up to 20 more days to get ready for a hearing
- the right to ask that the case be moved to tribal court (if there is one)
- the right to a court-appointed attorney (at no charge) if the court decides that you can't afford to pay for one
- the right to look at the documents about the case that the court has on file
- the right to reunification services (such as counseling or parenting classes) that can help you keep custody of the child

- the right to have a say in decisions about foster care or adoption of the Indian child
- the right to make sure that enough evidence is presented before your right to keep custody of the child is taken away. For example, a court can't take custody away from you unless it has proof that the child will suffer serious emotional or physical harm if he or she remains with you. An expert must give this kind of proof.

What notice will I get if there is a custody case about the child in my custody?

In cases where ICWA applies, the law says that the court has to give you “**proper notice**” about the case. This means:


- You must receive the notice in writing. The notice must be sent by registered or certified mail, along with return receipt.
- You must receive the notice at least 10 days before the hearing.
- The notice must include information about the “**nature**” of the case (such as what kind of hearing it is, and the date, time, and place the hearing is scheduled for).
- The notice must inform you of your right to “**intervene**” (participate) in the case.

What if I don't get proper notice?


- If you didn't get proper notice, but you can come to court on the day of the hearing, you should. You should tell the

judge that you didn't get proper notice. If you need it, you should ask for a **"continuance"** (to have the hearing changed to a future date). A continuance will give you extra time to prepare for the hearing or find an attorney.

- If you didn't get proper notice about a hearing, it is **"subject to invalidation."** This means that all the **"orders"** made at the hearing may be **"vacated"** (set aside) or reversed. You have the right to ask for invalidation. This means you have the right to ask the court to vacate all the orders made at the hearing.

 **TIP:** **"Orders"** are instructions given by a judge that command (or "order") another government department or agency to take some specific action. For example, if you got custody of an Indian child in a state court, the piece of paper that the judge signed that gave you custody is called an order. These are also called **"court orders."**

- If you decide to ask for invalidation, you should do it right away. Otherwise, your right to object to the court order may be **"waived"** (lost).
- You should always tell the court if you didn't get proper notice, even if you don't want to ask for invalidation. This will help make sure you get proper notice of future hearings.

 **TIP:** If you are involved in an ICWA case, you may want to refer to the ACORN Community Legal Education Guide, "What Is the Indian Child Welfare Act?" for more information.

☉ Proof of Indian Custodianship ☉

What can I do to make it easier to have my rights as an Indian custodian recognized?

If a parent transferred custody of his or her child to you, the parent can fill out an "Indian Custodian Form." This form:

- proves that the parent gave you temporary custody **and**
- proves that you have the power to make decisions about medical care for the child

Do I have to have a completed Indian Custodian Form in order to prove I'm an Indian custodian or use this power?


You don't need to fill out a specific form or go through any specific process to set up an Indian custodianship. But having a form that proves you have custody of the Indian child may make it easier for you to **"exercise"** (use) your rights to make decisions about medical care or enroll the child in school.

Why will having proof make it easier for me to exercise my rights as an Indian custodian?

- Schools may not let you enroll the child unless you can prove you have the right to do so.
- Medical staff may not treat the child unless you can prove you have the right to make decisions about their medical

care.


- Proof that you have the right to make decisions for the child provides protection for the school or doctor. For instance, if you didn't have permission to make medical decisions for an Indian child, a doctor could get in trouble with the parents if he or she treats them.

 **An Indian Custodian Form**
("Designation of Indian Custodian") is attached for you to use.

Is there any other way to prove that I have custody of an Indian child?


Yes. There are several other ways you can prove that you have custody of an Indian child:


- If you got custody of an Indian child from a state court or a tribal court, you can use the court order that gave you custody. You may need to get a certified copy of the court order to prove that it's still in effect.

 **TIP:** You can get a certified copy of the court order from the court clerk where the child custody hearing took place. You may have to pay for the certified copy. A "**certified copy**" is one that is issued directly by the court.

- If you got custody under tribal law or custom, but the tribe doesn't have a formal court system, you can ask for a letter from the tribal leader (for example, the Tribal Chairperson) or a resolution from the tribal government.

- If you can't get any of the documents listed above, you can complete a "**declaration**" or an "**affidavit**" that describes how you got custody of the child. These may be accepted as proof of custody.


 **TIP:** An **affidavit** is a written statement where the person who signs it swears that the information on the form is true and correct to the best of their knowledge. It must be notarized. A **declaration** is also a written statement where the person who signs it swears that the information on the form is true and correct to the best of their knowledge. The person who makes it promises they are telling the truth under "**penalty of perjury.**" This means that if they knew they were lying, they would have to pay a fine or go to jail. A declaration does not have to be notarized.

 To find out how you can get an affidavit or a declaration, you can contact your local CILS office.

☼ For Indian Parents ☼

I'm an Indian parent and I want someone else to be the Indian custodian for my child. What do I do?


As an Indian parent, you can choose to transfer the temporary custody of your child to someone else. If you make this choice of your own free will, it is called "**voluntary.**"


 **TIP:** If you don't freely choose to

transfer temporary custody of your child to another person, it is called “**involuntary**.” An example is if Child Protective Services removes your child from your home.

If you want someone else to be the Indian custodian for your child:

- Review the information on Pages 1-6 of this guide so you know what an Indian custodian is, understand how someone can become one, and know what rights and responsibilities the Indian custodian will have.
- Remember, you will still have rights as the child’s parent, as well as the responsibility to support the child financially.
- Remember that your decision to name someone else as Indian custodian does not have to be permanent. If your decision to transfer custody was **voluntary**, you can reverse your decision whenever you want.


 If you want to make someone else an Indian custodian, you can fill out the attached Indian Custodian Form.

 If you’re an Indian parent and you’re considering making someone an Indian custodian, you can call CILS to discuss your situation.

What if my decision to transfer custody to an Indian custodian was involuntary? Can it be reversed?

If, for instance, Child Protective Services removed your child from your home, then

your decision to give up custody was **involuntary** and can only be reversed by the court.

 You can contact your court-appointed attorney to discuss your situation.

Some Helpful Legal Terms

What do some of the legal words I hear about Indian custodians mean?

Some of the words you might hear or see in relation to Indian custodians, and their meaning, are listed below.

- **Affidavit** is a written statement where the person who signs it swears that the information on the form is true and correct to the best of their knowledge. It must be notarized.
- **Certified copy** is one that is issued directly by a government agency. It is printed on official government paper and has an official government seal.
- **Continuance** means to change a hearing to a future date.
- **Custody** includes being able to make decisions about a child’s day-to-day care and well-being and overall best interests. There are several different kinds of custody. **Legal custody** means having the right to make all major decisions about a child’s well-being, such as where to go to school and what doctor to see. Parents have legal custody by right, but

the court can give legal custody to someone besides a parent. **Physical custody** means having the child live with you and making decisions about his or her day-to-day care, such as what to eat and when to sleep. Many Indian custodians have physical, not legal, custody. **Joint custody** is when more than one person, such as both parents, has custody of the child.

- **Declaration** is a written statement where the person who signs it swears that the information on the form is true and correct to the best of their knowledge. The person who makes it promises they are telling the truth under “**penalty of perjury**.” This means that if they knew they were lying, they would have to pay a fine or go to jail. Unlike an affidavit, it does not have to be notarized.
- **De facto parent** is someone who has been taking care of the child’s day-to-day needs (as if they were the child’s parent) for a long time. De facto parent status must be given by a judge.
- **Exercise** means to use your rights.
- **Guardian** is someone who has custody of a child or children by order of the court. The court decides which specific rights each guardian has. Guardians may be related to the child or children, but they don’t have to be. He or she can also be called a **legal guardian**.
- **Hearings** are meetings with a judge, and the people, tribe(s), or institution(s) involved in the court case. It usually takes place in a courtroom. But when children are involved, the meeting takes

place behind closed doors. During the hearing, each side argues for their point of view in the case.

- **ICWA** (the Indian Child Welfare Act) is a federal law that sets out rules that state courts must follow in child custody cases where Indian children are being removed from their parents, Indian custodians, or guardians. These rules are designed to keep Indian children connected to their families and tribes.
- **Indian child**, according to ICWA, is an unmarried person under the age of 18 who is a member of a federally-recognized Indian tribe; **or** who is eligible for membership in a federally-recognized Indian tribe **and** is the biological child of a member of a federally-recognized Indian tribe.
- **Invalidated** means that the orders made at the child custody hearing are set aside or reversed.
- **Intervene** means to participate in a child custody case.
- **Nature** means the type of court case, and the date, time, and location where it takes place.
- **Notice** means to be told about a child custody case. **Improper notice** means that the parents, Indian custodian, or tribe were not told about a child custody hearing in the right way or in enough time to prepare for the case.
- **Orders** are instructions given by a judge that command (or “order”) another government department or agency to

take some specific action. They are also called “**court orders**.”

- **Proceedings** are court cases or hearings.
- **Terminated** means a parent(s)’ rights have been ended.
- **Vacate** means the court sets aside orders made at a child custody hearing.
- **Voluntary** means you choose to transfer the temporary custody of your child to

another Indian person of your own own free will. **Involuntary** means you did not freely choose to transfer temporary custody of your child to another Indian person. An example is if Child Protective Services removes your child from your home.

- **Waive** means an Indian custodian’s right to object is lost.



Rev. 12/03

Disclaimer

This information is intended to assist you with your legal problem. Each area of the law is complex and changing. Your case may have special factors that could affect the applicability of this information. CILS does not guarantee that this information is sufficient to resolve your legal problem. If you have any questions, you should seek the advice and counsel of an attorney.

ACORN Community Legal Education Series

The Advocacy, Collaboration, and Referral Network (ACORN) is a project of CILS. ACORN’s mission is to expand access to legal resources that increase Indian self-sufficiency. This guide is part of our Community Legal Education Series, providing Indians and Indian tribes with user-friendly information and self-help assistance pertaining to their legal status and rights. ACORN Community Legal Education guides, and more information about CILS and California Indian issues, are available on our website at www.calindian.org.

California Indian Legal Services

Central Office:

510 16th Street, Fourth Floor, Oakland, CA 94612

Phone: (510) 835-0284 ♦ Fax: (510) 835-8045 ♦ Email: contactCILS@calindian.org

Do you have a legal problem? For assistance, contact your local CILS office:

Bishop: (760) 873-3581, or (800) 736-3582

Escondido: (760) 746-8941, or (800) 743-8941

Eureka: (707) 443-8397, or (800) 347-2402

Oakland: (510) 835-0284, or (800) 829-0284

Santa Rosa: (707) 573-8016, or (866) 251-8016

